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FILED
OCT 11 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 538

MY STORE, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF OF PETITIONER.

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Petitioner replies to the brief of Respondent, National Labor Relations Board in opposition to the Petition for Writ of Certiorari as follows:

I. THE BRIEF IN OPPOSITION DOES NOT CHALLENGE PETITIONER'S ARGUMENT THAT THE SEVENTH CIRCUIT HAD ADOPTED AN IMPROPER TEST FOR DETERMINING SUBSTANTIAL EVIDENCE.

Rather than present any analysis of Petitioner's contention that the Seventh Circuit has misapprehended and misapplied the rule of *Universal Camera* v. *NLRB,* 340 U. S.

474 (1951), the NLRB in its Brief in Opposition chooses instead to attempt to review the substantiality of the evidence before the court below. The Board apparently does not contend that the Seventh Circuit's "conclusive proof" test can be reconciled with the test of *Universal Camera*, nor does the Board challenge the Petitioner's argument that such test is not responsive to *Universal Camera*.

As stated in the Petition, this Court is not requested to review the substantiality of the evidence in this case. The Petitioner submits that by requiring the Petitioner to show *conclusively* that the strike which occurred on May 2 was motivated by economic considerations, the court below has adopted a test incompatible with *Universal Camera*. In short, the court below should have looked at the evidence which contradicts the Board's findings for the purpose of evaluating the substantiality of the evidence supporting the Board's finding and not for the purpose of determining whether such evidence conclusively proved that the Board's finding was wrong.

In *Universal Camera* this Court rejected an approach to substantial evidence which did not "take into account whatever in the record *fairly detracts* from its (the Board's finding) weight." (340 U. S. 488) (Emphasis added.) The "conclusive proof" test adopted by the Seventh Circuit falls short of this requirement for it is quite possible that one might be unable to prove conclusively that the Board was wrong even though the evidence detracting from the Board's finding make it such that the Board *could not have fairly reasoned from the whole record as to its findings*. Such a test destroys the necessary relation that exists between rationality and the existence of substantial evidence.

The Board admits that the court below has adopted a test which requires Petitioner to prove conclusively that

the Board was wrong before a lack of substantiality can be found. At page 11 of its Brief, the Board states:

> "The Court's statement that evidence of the Union's publicity during the strike was not conclusive as to the motivation for the strike obviously meant simply that such evidence was not *completely dispositive* of the issue . . ."

It is obvious that the "completely dispositive" standard is identical to the "conclusive proof" test of the Seventh Circuit. Without stating how the "completely dispositive" or the "conclusive proof" test is compatible with *Universal Camera,* the Board goes on to state that by adopting this standard, the court below was merely considering the evidence contrary to the Board's finding along with all other factors in the case. Whether or not the thought processes of the court followed this pattern is not clear. In any event, it is irrelevant. What is important here is that by requiring Petitioner to prove conclusively that the Board was wrong, the court has adopted too strict a standard for evaluating the evidence contrary to the Board's findings. Cf. *NLRB* v. *Walton Manufacturing Company,* 369 U. S. 404 (1962). *Rather than review the evidence that the strike was economically motivated in terms of its overall effect on the evidence supporting the Board, the court has considered the negative evidence in terms of its integrity for purposes of proving the Board conclusively wrong.* It is respectfully submitted that this Court's intervention is required to correct this error.

II. THE COURT BELOW CONSIDERED ONLY PART OF THE RECORD AS A WHOLE.

Not only has the court below improperly required the Petitioner to prove the Board conclusively wrong, but it has additionally erred by failing to consider *all* the evidence in this case contrary to the Board's finding. In its review the court has admittedly limited its consideration of evidence contrary to the Board's findings to "Union publicity during the strike" (335 F. 2d 498) [1] omitting any consideration of evidence prior to the strike.[2] Such a fragmented review of the evidence is clearly not responsive to the requirement that the record be considered as a whole.

The Board does not challenge the above. It states that the court's reference to the phrase "publicity during the strike" is "merely descriptive" precluding the "tortured" reading given the phrase by Petitioner (Br. in Opp., p. 11). It seems strange, indeed, for Respondent to characterize as "tortured" a reading of the opinion that is no more

1. This evidence consisted of (1) a paid advertisement by the Union in the Taylorville "Breeze Courier" on May 4, 1963, asking, "What Are the Issues That Caused This Strike?" The Union unequivocally answered its own question: "Union Wages . . . Union Benefits and Union Working Conditions." (Resp's Ex. 9; J. A. 385), (2) a handbill distributed to shoppers in front of Petitioner's store during the strike which again unequivocally stated that the strike was caused by Petitioner's failure to "Pay Union Scale . . . OR . . . Agree to 27 Separate Contract Terms already benefitting union members." (Resp's Ex. 8, J. A. 383.)

2. The evidence that the strike was economically motivated that occurred prior to the strike is summarized in the testimony of Union negotiator Burki who was in charge of the negotiations for the Union at the last negotiation meeting (April 22) before the strike to the effect that the Union considered that there were three major areas of disagreement on the previously discussed "Union shop, term of contract, and department heads"; that since this last meeting produced no results satisfactory to the Union on these points, Burki concluded "that the only way that the Union could make their desires known a little more forcefully . . ." was to take the strike vote (J. A. 74, 75).

than what the words themselves state. It is a familiar rule of construction that a writing must read as a whole so as to give full meaning and effect to all its parts; an interpretation which renders some portion superfluous or meaningless should be avoided. Thus, Respondent's interpretation of the phrase, "Union publicity during the strike" as "merely descriptive" disregards the plain import of the court's words and renders them unnecessary. Certainly if the court had meant the interpretation attributed to it by the Board, it could have been so stated.

It is also an established rule of construction that specific reference to an item or items of the same generic type necessarily excludes those items not mentioned. Thus, by specifically referring to the period of time *after* the strike had commenced, the court's words must be interpreted to mean that no consideration was given to events which occurred prior to the strike in determining whether the strike was economically motivated or otherwise.

CONCLUSION.

The court below has compounded one error on top of another. In addition to requiring that Petitioner prove "conclusively" that the strike was economically motivated, the court has considered only part of that evidence in its overall consideration of this case. The first error is of a qualitative nature which overlooks the proper application of the substantial evidence test as requiring a consideration of evidence detracting from the Board's findings even though such evidence may be less than conclusive proof that the Board was in error. Additional error is caused by the court's admitted failure to consider the record as a whole, directly contrary to the statute and *Universal Camera*.

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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